

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

LARRY D. ELLSWORTH,

Plaintiff,

v.

CHARLES H. WEBB, ANDREW T.  
STAVE, and the COUNTY OF  
ASOTIN; WILLIAM EDELBLUTE and  
JANE DOE EDELBLUTE, husband  
and wife,

Defendants.

NO. CV-03-0148-EFS

**ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT,  
MOTION FOR AWARD OF ATTORNEY  
FEES, AND MOTION FOR  
CERTIFICATION AND GRANTING  
PLAINTIFF'S MOTION TO AMEND  
SCHEDULING ORDER**

Before the Court are Plaintiff's Motion for Summary Judgment to Dismiss Defendant Edelblute's Claim for Attorney Fees, (Ct. Rec. 101), Plaintiff's Motion for Award of Attorney Fees to Dismiss Mr. Edelblute's Frivolous Counterclaim for Attorney's Fees, (Ct. Rec. 119), Plaintiff's Motion for Certification to Washington State Supreme Court of Issues of State Law, (Ct. Rec. 94), and Plaintiff's Motion to Modify Scheduling Order, (Ct. Rec. 107). These motions were set to be heard on September 30, 2005. After reviewing the submitted materials, the Court finds that oral argument is not warranted and rules on the motions without oral presentation pursuant to Local Rule 7.1(h)(3). As is explained below, the Court denies Plaintiff's Motion for Summary Judgment to Dismiss Defendant Edelblute's Claim for Attorney Fees, Motion for Award of

1 Attorney Fees to Dismiss Mr. Edelblute's Frivolous Counterclaim for  
2 Attorney's Fees, and Motion for Certification to Washington State Supreme  
3 Court of Issues of State Law, and grants Plaintiff's Motion to Modify  
4 Scheduling Order.

5 **A. Plaintiff's Motions for Summary Judgment & for Attorney's Fees**

6 Plaintiff asks the Court to dismiss the counterclaim in Defendant  
7 Edelblutes' July 25, 2005, Answer to Second Amended Complaint for Damages  
8 and Counterclaim Against Plaintiff, (Ct. Rec. 91), arguing that Mr.  
9 Edelblute previously waived his right to recover attorney's fees from Mr.  
10 Ellsworth. The Court agrees Mr. Edelblute waived his right to recover  
11 attorney's fees by virtue of his previous declaration. (Ct. Rec. 102:  
12 Decl. Kinkley at 102-2 at 2); *see Mid-Town Ltd. P'ship v. Preston*, 69  
13 Wash. App. 227, 233 (1993). This declaration serves as substantial  
14 evidence of unequivocal acts or conduct showing intent to waive a known  
15 right. *See Guillen v. Pierce County*, 127 Wash. App. 278 (2005).

16 However, the Edelblutes clarify in their opposition to Plaintiff's  
17 motion that they are not seeking recovery of attorney's fees, but rather  
18 reimbursement for all costs, expenses, and fees (other than attorney)  
19 incurred while Mr. Edelblute represented Plaintiff Ellsworth. The Court  
20 finds Mr. Edelblute did not waive his right to recover for such costs,  
21 expenses, and fees. Accordingly, the Court denies the Plaintiff's  
22 dismissal motion. In addition, the Court denies Plaintiff's Motion for  
23 Award of Attorney Fees to Dismiss Mr. Edelblute's Frivolous Counterclaim  
24 for Attorney's Fees, finding the Edelblutes' counterclaim is not  
25 frivolous or advanced without reasonable cause. *See R.C.W. § 4.84.185.*

1 **B. Plaintiff's Motion for Certification to Washington State Supreme**  
2 **Court of Issues of State Law**

3 Plaintiff specifies six specific issues it wishes the Court to  
4 certify to the Washington Supreme Court pursuant to R.C.W. §§ 2.60.010-  
5 .030.<sup>1</sup> Plaintiff seeks this relief without identifying to the Court what  
6 the current state of the law in Washington is regarding these issues.  
7 Although the law regarding these issues may not be clearly determined,  
8 a federal court is not required to certify a question of local law, but  
9 rather this option is discretionary. R.C.W. § 2.60.020; *NLRB v. Calkins*,  
10 187 F.3d 1080, 1089 (9th Cir.1999). Accordingly, before the Court will  
11 definitively rule on whether such issues should be certified to the  
12 Washington Supreme Court, Plaintiff must establish (1) what the current  
13 state of the law is in Washington and (2) show how this law does not  
14 answer the listed issues. Accordingly, the Court denies this motion with  
15 leave to renew.

16 **C. Plaintiff's Motion to Modify Scheduling Order**

17 Plaintiff asks the Court to modify the scheduling order as a result  
18 of the settlement with Asotin County, Mr. Webb, and Mr. Stave. Defendant  
19 Edelblutes did not file an opposition. Given current counsel have been  
20

---

21 <sup>1</sup> R.C.W. § 2.60.020 provides:

22 when in the opinion of any federal court before whom a  
23 proceeding is pending, it is necessary to ascertain the local  
24 law of this state in order to dispose of such proceeding and  
25 the local law has not been clearly determined, such federal  
26 court *may certify* to the supreme court for answer the question  
of local law involved and the supreme court shall render its  
opinion in answer thereto.

26 R.C.W. § 2.60.020 (emphasis added).

involved in this lawsuit for less than a year and pending legal issues remain, the Court finds a continuance of the trial appropriate.

For the reasons given above, **IT IS HEREBY ORDERED:**

1. Plaintiff's Motion for Summary Judgment to Dismiss Defendant Edelblute's Claim for Attorney Fees, (**Ct. Rec. 101**), is **DENIED**.

2. Plaintiff's Motion for Award of Attorney Fees to Dismiss Mr. Edelblute's Frivolous Counterclaim for Attorney's Fees, (**Ct. Rec. 119**), is **DENIED**.

3. Plaintiff's Motion for Certification to Washington State Supreme Court of Issues of State Law, (**Ct. Rec. 94**), is **DENIED, with leave to renew**.

4. Plaintiff's Motion to Modify Scheduling Order, (**Ct. Rec. 107**), is **GRANTED**. The parties are to call the Court's public conference line (509-372-3051) today, Friday, September 30, 2005, at 10:30 a.m. in order to select a new trial date.

**IT IS SO ORDERED.** The District Court Executive is hereby directed to enter this Order and to furnish copies of the Order to counsel.

**DATED** this 30th day of September 2005.

s/Edward F. Shea  
EDWARD F. SHEA  
United States District Judge

Q:\Civil\2003\0148.ms.j.attyfees.certif.frm